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No. 93-428

In The Supreme Court of the United States

October Term, 1993

SEABOURN S. LIVINGSTONE,
Petitioner,

v.

RICHARD M. DONAHEY and PATRICIA A. DONAHEY,
Plaintiffs/Respondents,

and

HELEN L. BOGLE,
Third Party Plaintiff/Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

PETITIONER LIVINGSTONE'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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As required by Supreme Court Rule 15.6, this Reply is limited to new issues raised by Respondents in their Brief in Opposition.

I.

ATTORNEYS FEES ISSUE

Respondents, the Donaheys, argue that Livingstone's Petition for review of the attorneys fees issue (whether a party may recover costs of litigation as "response costs") is premature because the Sixth Circuit remanded this case for a determination of what constitutes reasonable attorneys fees recoverable under CERCLA.[1] Livingstone has argued on remand that the

[1] Respondents also argue that Livingstone's Petition is incomplete or defective because Livingstone failed to comply with

(*concluded on page 2*)

Donaheys have failed to prove their attorneys fees. Now the Donaheys argue that if the trial court agrees with Livingstone, acceptance of the Petition might result in this Court deciding the attorneys fees issue "in a vacuum," *i.e.*, in a case where ultimately no attorneys fees are awarded.

The Donaheys miss the point, however, because the crucial ruling by the Sixth Circuit was that *as a matter of law* private litigants are entitled to collect attorney fees under Section 107 of CERCLA, 42 U.S.C. 9607. The particular amount of the awarded fee is not important. It is the Court's departure from the American Rule (that absent express statutory authorization each party bears its own attorney fees) which is the problem to be addressed. Nowhere does CERCLA Section 107 allow an attorney fee award to private litigants.[2]

(*continued from page 1*)

Supreme Court Rule 12.4. *See*, Brief in Opposition, at p. 5, n. 2. In making this argument, respondents omit to mention that St. Clair Rubber Company ceased to exist in 1982; that the attorneys for St. Clair petitioned and were permitted to withdraw as counsel for St. Clair after filing St. Clair's brief on appeal to the Sixth Circuit; and that counsel for St. Clair notified all parties to the proceeding below, orally or otherwise, that they would not respond to further pleadings or communications on behalf of St. Clair. In light of the non-existence of St. Clair or any agent for St. Clair, respondents' argument that Livingstone failed to comply with Rule 12.4 is specious. In addition, both respondents and former counsel for St. Clair received both a copy of Livingstone's Petition and the Notice of Filing of Petition required by Rule 12.1. Even if Livingstone had failed to comply with Rule 12.4, and even if St. Clair had an interest in the further disposition of the attorneys fees issue, no prejudice could possibly result to respondents or to St. Clair as they received all information necessary for them to participate in this appeal.

2 Moreover, at trial, the district court ruled that plaintiffs would not be permitted to reopen the proceedings and offer additional proof of the payment of and purpose of their attorneys' fees, *see*, Trial Court Memorandum Opinion and Order, Petition, at A48-A49 and n. 17. Accordingly, the record is as complete now as it ever will be and appeal of the attorneys fee issue, therefore, is not premature.

Respondents also suggest that if the attorneys fees issue is of importance, then Congress will address it when reauthorizing CERCLA in 1994 and review of the issue is unnecessary. Respondents, however, have pointed to no proposals, communications or statements by any agency, legislative body or other entity which might indicate that the issue is actually under consideration or likely to be so during the legislative process of reauthorization. Their assertion that Congress will address this area of ambiguity in CERCLA is speculative at best. Furthermore, the attorneys fees issue has arisen in many cases which are pending in courts at both the trial and appellate levels; for most of these, a legislative amendment or clarification will come too late.

II.

CORPORATE SHAREHOLDER LIABILITY ISSUE

The Donaheys claim that whether a corporate shareholder, officer or director may be held liable for the corporation's waste disposal practices is, if important, likely to be addressed by Congress in its reauthorization of CERCLA in 1994. Again, they have not pointed to any evidence or authority to support this assertion.

The Donaheys also take issue with Livingstone's presentation of the facts, and cite to portions of the record which they claim contradict Livingstone's position that he was not involved and had no reason to know of St. Clair's waste disposal practices. In other words, the Donaheys would rewrite the findings of fact made by the District Court and the Sixth Circuit. Apparently even they understand that the bare statement that Livingstone owned all of the shares of St. Clair Rubber is an insufficient basis on which to transfer to him personally all of the Corporation's environmental liability. This provides more, not less, reason for this Court to grant the Petition.

At a minimum this Court should firmly state whether mere stock ownership is enough to impose CERCLA liability. If it is not, then the Petition should be granted to allow the Court to settle for all shareholders nationwide the extent to which they can rely on the limited liability they thought their corporate investments included.

Finally, respondents assert that the Sixth Circuit's decision is not in conflict with those of other courts of appeals, citing the reasoning of the district court in *Kelley* v. *Thomas Solvent*, 727 F.Supp. 1554 (W.D. Mich. 1989) and *Kelley* v. *ARCO Ind. Corp.*, 723 F.Supp. 1214 (W.D. Mich. 1989). As discussed in the Petition, the opinions in these cases create rather than reconcile conflict among the courts, and Judge Enslen himself acknowledged that he was manufacturing a standard for liability under CERCLA. *Id.*, 727 F.Supp. at 1560, 1562, and 723 F.Supp. at 1217. Livingstone respectfully suggests that the *Thomas Solvent* opinions do not succeed in reconciling contrary case law, *see*, *Kelley* v. *Tiscornia*, Case No. 5:90-CV-62 (W.D. Mich., *decided*, April 23, 1993), reproduced at Petition, pp. A 63-A 80, and that the standard for liability should be set, in the absence of direction from Congress, by this Court.

CONCLUSION

For the reasons stated above and in Livingstone's Petition for Writ of Certiorari, Petitioner Livingstone respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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